



U.S. Department of Veterans Affairs

Executive Leader's

GUIDE

Desk Reference to Equal Employment
Opportunity Complaints



Office of Resolution Management — 2011



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A Message from the Deputy Assistant Secretary

Dear VA Executives:

Thank you for taking the time to review this Guide. It has been developed for you, the executive leader, to provide information and reinforce your knowledge of the Equal Employment Opportunity (EEO) complaint process, as well as add some insight into complaint prevention and early resolution. As you know, one of the senior executive's critical performance elements is to ensure compliance with applicable EEO laws, regulations, Executive Orders, Management Directives, and VA policies. Executive leaders are to promptly address allegations of discrimination and retaliation, engage in early conflict management and alternative dispute resolution (ADR); and advance the goals of the VA Diversity and Inclusion Strategic Plan, including the Secretary's two percent hiring goal for individuals with targeted disabilities.

Since its inception in 1998, the Office of Resolution Management (ORM) has made enormous progress in processing EEO complaints. Only through prudent innovation and knowledge sharing can we continue to improve. With your support, and dedication to a workplace free of illegal discrimination, VA can create an Employer of Choice environment that ultimately ensures improved care and services to America's Veterans and other VA stakeholders.

The following pages present a sampling of what is available to you and your staff from ORM. Of particular importance is ORM's development of, and VA's growing participation in ADR. The Department actively uses ADR as a tool to resolve workplace disputes and EEO complaints. Our data shows that VA-wide the rate of participation in ADR increased from 26 percent in 2007 to 52 percent for fiscal year 2010. We want all of our customers to consider ADR as the first opportunity to resolve their issues. ADR has proven to be highly effective, both in resolving complaints and reducing the costs associated with processing informal and formal EEO complaints. Another intangible benefit is that lines of communication are established and strengthened. Such a benefit can only enhance VA's level of morale and customer service.

We are here to assist you and your employees.

*Deputy Assistant Secretary
for Resolution Management*

Who We Are

Who We Are

MISSION

To provide timely and high quality complaint processing while fostering a discrimination-free work environment through early resolution, education, training, and prevention methods.

VISION

ORM will be the best in government in the timely and confidential processing of all EEO complaints while remaining sensitive and compassionate to all we serve. We seek to maintain the trust and confidence of the all VA employees and others touched by our work.

VA's MOTTO

Honoring and serving our Nation's Veterans by promoting an environment that is free of discrimination.

VA Offices Responsible for Processing EEO Complaints

OFFICE OF RESOLUTION MANAGEMENT (ORM)

ORM's timely and high quality EEO complaint processing services include counseling, investigation, ADR, and training. ORM renders final agency decisions for procedural issues and breach of EEO settlement agreement claims. ORM is responsible for monitoring compliance of agency final orders where discrimination has been found and for Equal Employment Opportunity Commission (EEOC) appellate decisions.

ORM carries out its responsibilities through the headquarters office and a nation-wide network of six field offices and 13 satellite offices.

OFFICE OF EMPLOYMENT DISCRIMINATION COMPLAINT ADJUDICATION (OEDCA)

OEDCA issues final decisions on the substantive merits of discrimination complaints, including final decisions regarding attorneys' fees and compensatory damages. OEDCA also takes final action on complaints that have been decided by an EEOC Administrative Judge.

How Could Anyone Believe That I Would Illegally Discriminate?

Many managers and supervisors ask themselves this question and become angered at the prospect of having their integrity questioned. Most understand that if a claim of discrimination in the workplace arises, the best policy is to get involved in the process and try to resolve the issues as quickly as possible. The process is driven by a complainant's belief that he or she has been wronged, whether that belief is true or not. It is often the lack of addressing concerns early that leads to discrimination complaints.

The answer may be found in our ability to work together. We work and live in a diverse society, which provides vast opportunities for positive experiences as well as potential problems and conflicts. Each employee brings to the workplace a unique blend of cultural and social identities. Employees, including managers, believe that they will be rewarded for good performance and receive tangible benefits. In some cases where employees believe that they have done well and are not recognized, they may begin to question not themselves, but the system that they perceive as denying them the recognition that they believe they deserve. They may believe that the person representing the system, namely their supervisor or manager, is holding them back or has wronged them because of who they are. The result is that some employees feel their only course of action is to file an EEO complaint.

While the manager or supervisor may consider such complaints baseless or even frivolous, it is the aggrieved individual who is experiencing the feelings and beliefs of wrongdoing. The melding of unique cultural and social values in a diversified workforce can, at times, contribute to these feelings of employment discrimination and the need to take action.

Managers are often perplexed as to why an employee would even consider claiming that they intentionally practiced discrimination. They often have feelings of anger, bewilderment, and betrayal when one of their employees alleges that they have discriminated against them. Just as the complainant may have strong feelings that they have been discriminated against, managers are also likely to believe fervently that they have done no wrong. Sometimes, managers do not realize that their words or actions may be seen as manifestations of illegal discrimination.

How Could Anyone Believe That I Would Illegally Discriminate?

Even when no one has intentionally set out to discriminate against another, illegal discrimination can be interpreted from seemingly innocent acts. Because each employee brings a unique set of values to the workplace, we should always try to consider cultural differences and how these differences might influence one's reaction to a particular form of behavior.

We need to keep in mind that working together in a productive and harmonious environment depends on an appreciation of cultural differences, understanding, tolerance, and open communication. To this end, VA provides training programs in diversity awareness designed to help us learn about and celebrate our various cultures.

It is important to acknowledge the fact that inappropriate behavior and illegal employment discrimination do occur. When we prejudge someone on the bases of race, color, religion, sex, national origin, age, disability, sexual orientation, genetic information, or reprisal and then deny that person a benefit of employment because of our prejudgment, we have committed an act of illegal discrimination.

Although most complaints do not result in a finding of illegal employment discrimination, it would be foolish to suggest that acts of discrimination do not occur. Some claims of discrimination cannot be sustained due to a lack of evidence from one of the parties involved.

At the same time, we need to recognize that employees are often apprehensive about speaking directly to their supervisors about issues that concern them. The EEO complaint process serves not only as a means for adjudicating rewards or punishment, but also as a conduit for communication between employees and management.

Frequently Asked Questions About The EEO Process

ORM understands that a VA executive's time is precious. This section will provide you with brief answers to questions often faced by leaders. (For more detailed information, contact your local ORM field office.)

WHAT DOES ORM DO?

ORM processes EEO complaints and seeks alternative methods for complaint resolution. We encourage participation in activities that improve the morale and efficiency of the Department's employees in an effort to improve service to our Veterans.

WHAT ARE THE STAGES OF THE COMPLAINT PROCESS?

The EEO complaint process consists of two stages: informal and formal. The first stage begins with EEO counseling, which gives the parties an opportunity to work with ORM to try to solve the complaint informally. The formal stage-which begins only if a complainant files a formal complaint of discrimination after completing the counseling stage-includes reviewing the complaint to determine whether procedural requirements for further processing have been met; conducting investigations; and forwarding the complaint to OEDCA or EEOC for a decision based on the merits.

WHY IS THE FILING OF BOTH AN INFORMAL AND A FORMAL EEO COMPLAINT PERMISSIBLE?

Federal laws and regulations require an agency to attempt informal resolution, conducted by an EEO Counselor. The intent of informal counseling is to carry out a basic inquiry, sufficient to communicate the interests of all parties, in an effort to resolve the complaint. The formal process, also required by Federal laws and regulations, establishes an official record of the complaint, which the agency and EEOC use to evaluate the complaint and determine whether illegal discrimination has taken place.

WHO MAY REPRESENT ME IN AN EEO COMPLAINT?

A management official may select a personal representative, such as an attorney, or agency counsel as long as his/her representative's position with the VA does not present a conflict of interest. An EEO counselor or EEO manager may not serve as a representative. If a representative or attorney is designated, all documents pertaining to the EEO complaint will be submitted directly to the representative or attorney with a copy to the executive.

WHAT IS ALTERNATIVE DISPUTE RESOLUTION (ADR)?

ADR is a group of processes that employ specially trained neutral persons who help individuals with a problem or dispute to resolve the issues in the controversy. The most frequently used ADR process in VA is mediation. Through ADR, a neutral third party assists individuals to find a mutually acceptable solution to their dispute. ADR is a problem-solving process; it is voluntary and effective.

HOW CAN I REDUCE THE NUMBER OF COMPLAINTS WITHIN MY ORGANIZATION?

- Seek early resolution and encourage participation in ADR.
- Make sure your expectations are clear and hold subordinate managers accountable.
- Be involved and ensure that there are open lines of communication.
- Train your staff, especially as it relates to EEO and management training.
- Enforce zero tolerance if inappropriate behavior or discrimination occurs.
- Support cultural diversity efforts.

Frequently Asked Questions About The EEO Process

Why does ORM accept complaints that appear frivolous or without merit?

- Support active EEO and reasonable accommodation committees.
- Seek assistance from ORM and your facility-based EEO professionals.

WHY DOES ORM ACCEPT COMPLAINTS THAT APPEAR FRIVOLOUS OR WITHOUT MERIT?

When a formal complaint is filed, ORM must determine whether the complaint is subject to further processing or dismissal. Federal laws and regulations set out the circumstances under which an agency may dismiss a complaint. The merits of the complaint cannot be considered. A complaint must be accepted for further processing if it identifies a basis protected under EEO laws; if it is timely raised and filed; if it alleges a harm or loss with respect to a term, condition, or privilege of employment; and if it does not state the same claim as one that is pending or has been previously decided.

CAN I STILL RESOLVE A COMPLAINT THROUGH ADR ONCE IT HAS GONE FORMAL?

Absolutely! A complaint can be resolved at any time throughout the process. ADR is one vehicle that can be used. Simply contact your servicing ORM field office for additional guidance.

HOW ELSE CAN ORM ASSIST ME?

ORM has several other tools to assist leaders besides the processing of EEO complaints. Under VA's Human Capital Investment Plan (HCIP), ORM also offers a variety of resources and services to prevent and resolve complaints. More information on these tools is available on page 51. ORM also offers EEO and ADR training to facilities. See page 55 for additional information. A catalog listing of available training courses is located at <http://vaww4.va.gov/orm/docs/CourseCatalog.pdf>. The Root Causes of Discrimination Complaints DVD, which is available for every organization that has complaint activity, provides an understanding of why a complaint may have been filed. ORM also has a team of professionals willing to come to your facility to analyze and recommend improvements through our Organizational Climate Assessment Program (OCAP).

HOW DO I GET IN TOUCH WITH ORM?

You can call the Office of Resolution Management at (202) 461-0280, or any ORM field or satellite offices throughout the country. Their phone numbers are on page 56.

Some *Do's and Don'ts* Regarding EEO Complaints

Do's and Don'ts

DO consider and encourage ADR before EEO complaints are initiated or at all stages of the complaint process.

DO make sure that you are always receptive to mediation.

DO encourage managers to participate in and support ADR.

DO secure all documents and memorialize events upon notification that an EEO complaint has been filed.

DON'T treat an employee differently because s/he filed an EEO complaint or protested discrimination.

DO contact ORM or your facility-based EEO manager if you would like to attempt settlement.

DON'T retaliate against an employee who files an EEO complaint alleging you as the responding management official.

DON'T take it personally. Complainants have their own interpretations of what happened and you have yours.

DO take positive steps to avoid potential disputes. Train your staff and discuss your expectations regarding workplace diversity, inappropriate behavior, and discrimination.

DO contact ORM if you have any questions or concerns.

Discrimination Complaint Procedures

An employee, former employee, or applicant for employment may file a formal EEO complaint if he or she believes that discrimination-based on race, color, religion, sex, national origin, age (40 or older), disability, or reprisal has occurred. In addition, although sexual orientation, gender identity, and parental status are not protected under EEOC regulations, they are also forms of prohibited discrimination. If a complaint is filed on these bases, they will be processed by ORM and a final agency decision will be rendered by VA's Office of Employment Discrimination Complaints Adjudication. There are no appeal rights to EEOC. Further, the Genetic Information Nondiscrimination Act of 2008 (GINA), which took effect on November 21, 2009, makes it illegal to discriminate against employees or applicants because of genetic information.

There are two parts to a complaint: a claim and basis. A claim is an allegation that an action or inaction by management has negatively affected a condition of employment, such as denial of leave, non-selection, etc. The allegation must be related to one or more of the eight bases stated above that are protected by EEO regulations, or related to GINA, sexual orientation, gender identity, and parental status.

HOW DOES ONE BEGIN THE EEO COMPLAINT PROCESS?

An individual (aggrieved) who believes that he or she has been discriminated against must contact an EEO counselor within 45 calendar days of the date when the alleged discrimination occurred or, in the case of a personnel action, within 45 calendar days of the effective date of the action.¹ An aggrieved party may seek EEO counseling by calling 1-888-RES-EEO1 (1-888-737-3361) or visiting the local ORM field office.

An EEO counselor will inform the aggrieved party that he or she has the option to attempt resolution of the complaint through the ADR program or pursue resolution through the EEO complaint process. If the latter is elected, the counselor will make necessary inquiries into the matter to explore a mutually acceptable resolution. At the informal stage of the

¹ See the guide to rights of persons involved in the EEO process on page 22, and the EEO process flow chart and timeframes on page 23.

Discrimination Complaint Procedures

What happens if a formal complaint is filed?

complaint process, the aggrieved party has the right to anonymity. The EEO counselor is required to complete counseling within 30 calendar days of initial contact.

How is management involved at this stage of the process? _____

The facility director will receive notice that an aggrieved party has contacted ORM for EEO counseling. The first letter that management will receive from ORM will be when an employee in your facility contacts an EEO counselor. This is the first step in initiating an EEO complaint. At the informal stage of the complaint process, the complaining party has the right to anonymity.

If ADR is not elected, an EEO counselor will contact the responding management official (RMO) to discuss the particulars of the claim or claims.

WHAT HAPPENS IF THE ISSUES REMAIN UNRESOLVED AFTER THE EEO COUNSELING OR ADR IS COMPLETED?

An aggrieved party who opts to pursue the matter after counseling has concluded must file a formal EEO complaint within 15 calendar days from the conclusion of counseling. ORM will then conduct a procedural review of the complaint to determine whether it is acceptable for further processing, based on applicable laws and regulations. ORM must take one of three avenues with the complaint: acceptance for further processing, partial acceptance for further processing, or dismissal.

WHAT HAPPENS IF A FORMAL COMPLAINT IS FILED?

If the complainant files a formal complaint, ORM will inform management via the Notice of Receipt of Formal Complaint. Attached to this Notice of Receipt will be a copy of the formal complaint (usually on VA Form 4939). There is no action required by management at this point.

WHY ARE FORMAL COMPLAINTS DISMISSED?

Federal laws and regulations set out the only circumstances under which an agency may dismiss a complaint before investigation. A formal complaint can be dismissed only if it is determined that the complaint does not comply with applicable laws and regulations. The merits of the complaint cannot be considered.

The following are the regulatory reasons permitted for dismissal of an EEO complaint at the formal stage of the complaint process:

Untimely Counseling Contact:

For an initial contact to be considered timely, the complainant must have sought counseling within 45 calendar days of the alleged discriminatory act. There are certain occasions when there may be legitimate reasons for failing to contact ORM in a timely manner, such as not receiving training on the EEO complaint process, failure by the facility to display information regarding employees' rights to seek EEO counseling, or severe illnesses or personal issues that precluded the complainant from being able to contact ORM. Often, with claims of harassment or hostile work environment, a complainant will often raise allegations that occurred outside of the 45 day timeframe that may be accepted in support of a claim that was timely raised.

Untimely Filing of a Formal Complaint:

The complainant must file a formal complaint within 15 calendar days from the conclusion of counseling. Unless there are extenuating circumstances, the untimely filing of a formal complaint will result in dismissal.

Failure to State a Claim:

ORM determines whether the alleged conduct, if true, would constitute an unlawful employment practice under EEO laws and regulations. A complaint will be dismissed if it does not state a claim alleging a present harm or loss with respect to a term, condition, or privilege of employment for which there is a remedy.

Discrimination Complaint Procedures

Why are formal complaints dismissed?

States the Same Claim:

A complaint will be dismissed if the same claim is pending before or has been previously decided by the agency. The complaint must involve “identical matters” raised in a previous EEO complaint by the same complainant in order to be dismissed under this circumstance.

Abuse of Process:

Abuse of process is defined as a clear pattern of misuse of the EEO complaint process for ends other than that which it was designed to accomplish. The hurdle for such dismissals is very high, and few cases meet the criteria, as EEOC has long held that the EEO complaint process must be in favor of preserving a complainant’s EEO rights. The number of complaint filings alone is not a sufficient basis for determining that there has been an abuse of the process.

Complainant Files a Civil Action:

The agency has 180 calendar days from the filing date of the formal complaint to complete an investigation of the alleged discrimination. After 180 days, the complainant has the right to file a civil suit in Federal District Court. If the civil suit raises the same claims as the EEO complaint, however, ORM will dismiss the EEO complaint.

Issue Previously Decided:

If the same issues raised in the EEO complaint have been decided by a court of competent jurisdiction and the complainant was a party to the lawsuit, EEOC regulations mandate dismissal of the EEO complaint. Allowing the simultaneous pursuit of both administrative and judicial remedies would waste resources and create the potential for inconsistent or conflicting decisions.

Allegation Raised in Negotiated Grievance Proceeding:

ORM will ask management to advise us whether the employee has filed an appeal with the Merit Systems Protection Board (MSPB) or a union grievance on the same issue discussed with the EEO counselor. If a negotiated grievance procedure permits processing of allegations of discrimination, the complainant can file a formal EEO complaint or a written grievance, but not both. If the complainant elects a negotiated

grievance procedure by the “filing of a timely written grievance,” ORM will dismiss the EEO complaint if the grievance was filed first.

Appeal Made to Merit Systems Protection Board (MSPB):

A “mixed case complaint” is a complaint of employment discrimination related to or stemming from an action that may be appealed to the MSPB. A “mixed case appeal” is an appeal filed directly with the MSPB that alleges an appealable agency action was effected because of discrimination due to one or more of the eight protected bases. An individual may raise claims of discrimination in a mixed case as a direct appeal to the MSPB or as a mixed case EEO complaint with the agency, but not both. The action an individual files first is considered an election to proceed in that forum, and any subsequent action will be dismissed.

Complainant Alleges a Preliminary Step:

When a complainant alleges that a proposed or preliminary personnel action is discriminatory (e.g. proposed disciplinary actions), the complaint can be dismissed. The premise is that unless or until a personnel action is initiated, the complainant’s conditions of employment are not affected. However, if the complainant alleges the preliminary step was part of a pattern of harassment based on a prohibited basis, the proposed action cannot be dismissed because the preliminary step has allegedly affected the employee.

Complaint is Moot:

A complaint may be dismissed as moot if there is no reasonable expectation that the alleged violation will recur, and events have completely and irrevocably eradicated the effects of the alleged violation. If the complainant has made a timely request for compensatory damages, however, the Agency must address the issue of compensatory damages before dismissing a complaint as moot.

Dissatisfaction with the Processing of a Complaint:

EEOC regulations require the dismissal of a complaint alleging dissatisfaction with the processing of a previously filed EEO complaint. Claims of dissatisfaction with the processing of a previous complaint are processed by the ORM’s Executive Operations Office of Policy and Compliance (EO/OPC).

Discrimination Complaint Procedures

What happens when a formal complaint is accepted?

How is management involved at this stage of the process? _____

If the procedural review determines that the complaint does not comply with the applicable laws and regulations for further processing, the complaint will be dismissed. A letter of dismissal is sent to the complainant, advising of the reasons for the dismissal as well as appeal rights and procedures. The facility director also receives a copy of the dismissal letter. The dismissal closes the case unless the complainant appeals, and ORM's decision is reversed by EEOC.

WHAT HAPPENS WHEN A FORMAL COMPLAINT IS ACCEPTED?

If a complaint is accepted (or partially accepted) for further processing, an ORM EEO investigator will be assigned to the case. The investigator takes statements from witnesses under oath, gathers pertinent documents, and studies records to develop an impartial, factual record that allows a decision maker to draw conclusions as to whether discrimination has occurred.

How is management involved at this stage of the process? _____

If a formal complaint is accepted for further processing, a notice of acceptance is sent to the complainant and the facility director. In some instances, not all of the claims raised will be accepted for further processing. In such cases, the complainant and facility director will receive a notice of partial acceptance, explaining in detail what was accepted and what was dismissed. The notices of acceptance inform all parties that the complaint has been accepted for investigation and will be assigned to an impartial ORM EEO investigator.

The letter to the facility director includes a request for documentary evidence required for the investigative file. It is important that the facility comply promptly with the request for documents. If the facility fails to produce the evidence as requested, an adverse inference may be made against the agency, increasing the likelihood that there will be a finding of discrimination.

INVESTIGATIONS

EEOC laws and regulations instruct agencies to develop an impartial and appropriate factual record upon which to make findings on the claims raised in the written complaint. The timeframes for completing investigations are critical. Depending upon the type of investigation, the investigator may have 45 or 60 calendar days to complete the investigation. That is why it is imperative that all parties, including witnesses, participate willingly and cooperate with the investigator. Because they understand that the parties to a complaint rarely have spare time, the investigators are willing to work around the parties' schedule to obtain affidavits or other documentary evidence.

Agencies may use an exchange of letters or memorandums, interrogatories, investigations, fact-finding conferences, or any other fact-finding methods that efficiently and thoroughly investigate the matters at issue. To conduct investigations, ORM relies primarily on four investigatory methods: on-site, desk, written affidavit, or fact-finding. In certain instances, it may be appropriate to use a combination of methods.

ORM'S PRIMARY METHODS OF INVESTIGATION

On-Site and Desk (Telephonic) Investigations:

These investigatory methods are similar and are used to conduct investigations for complaints that are more complex in nature. A court reporter is present and makes transcripts for all on-site or telephonic witness interviews.

Written Affidavit Investigations (WAI):

This investigatory method using written affidavits, primarily from complainants, relevant responding management officials (RMOs), witnesses, and a subject matter expert includes documents that have been identified as relevant evidence to the action or actions in question. The WAI method of investigation requires the expenditure of fewer resources, but develops adequate factual records on which to determine whether discrimination occurred.

Discrimination Complaint Procedures

ORM's primary methods of investigation

Fact-Finding Investigations:

The complainant and an agency representative are present throughout the entire investigative proceeding. This on-site method of investigation is appropriate for complaints where a settlement appears possible. Both parties may present evidence in support of their positions and reply to the position of the other through a carefully structured process controlled by the investigator. A court reporter is present to make transcripts during the investigative proceeding. Although this is a recognized method of conducting investigations, it is seldom used by ORM.

How is management involved at this stage of the process? _____

The complainant and the facility director will receive letters² advising that the complaint has been assigned to an ORM EEO investigator. The letter to the facility also serves to inform management, along with EEO and HR personnel, to begin preparations for the investigation and to consider this part of the EEO process as another opportunity to resolve the complaint. The investigator will request any additional documentary evidence deemed necessary and will work closely with your EEO and HR specialists to obtain the requested information.

The responding management official (or officials) will receive notice of the type of investigation to be conducted, along with management's rights and responsibilities.

The facility will be provided an additional letter advising that ADR is available at any time during the EEO complaint process, including the formal investigative stage. Resolution is the key to a successful EEO complaint program. Not only do the immediate allegations get resolved, but there is also a possibility that the resolution may open new lines of communication, which in turn may improve the working environment and reduce the number of discrimination claims.

² ORM may use electronic mailing as a method for transmitting correspondence.

WHAT OCCURS AFTER THE INVESTIGATION?

Upon completion of the investigation, the complainant is sent a copy of the investigative file and can opt for an EEOC Hearing or a Final Agency Decision (FAD) from OEDCA. The investigative file includes three sections: Section A-all administrative documents related to the complaint; Section B-the testimony of all witnesses; Section C-the exhibits of evidence. (The evidence section includes relevant documents from both the complainant and management.) There is also an investigative summary, which includes the salient points from the witness's testimony and any other relevant evidence. EEOC regulations require that the investigator not draw any conclusions or make any recommendations regarding the merits of the evidence and testimony during the investigation.

How is management involved at this stage of the process? _____

The facility director will receive a letter indicating that the investigation has been completed, along with a copy of the investigative summary. If the complainant fails to elect an EEOC hearing or FAD, ORM will forward the complaint to OEDCA for a FAD. If the complaint contains claims that are appealable to the MSPB (otherwise known as mixed-case EEO complaints), the complainant does not have the right to request an EEOC hearing, and the complaint will be automatically forwarded to OEDCA for a FAD.

If the complainant requests an EEOC hearing, ORM will provide the facility Regional Counsel representative (or other designated management official representing the agency) a complete copy of the investigative file.

Once an Administrative Judge (AJ) from EEOC is assigned to the complaint, it is no longer under ORM's jurisdiction. The AJ will review the complaint file and determine whether a hearing will be held. The AJ also makes available the opportunity to resolve the complaint through ADR. In certain instances, the AJ may issue a summary judgment-the rendering of a decision without a hearing.

Discrimination Complaint Procedures

What happens when there is a finding of discrimination?

If the complaint goes to OEDCA for a FAD, a complete copy of the investigative file is provided to OEDCA. OEDCA reviews the complaint file, decides whether discrimination occurred, and sends a copy of its decision to the complainant and the facility director.

WHAT HAPPENS WHEN THERE IS A FINDING OF DISCRIMINATION?

If there is a finding of discrimination at the hearing stage, the EEOC submits a recommended decision to OEDCA and the complainant. OEDCA has 40 calendar days to either accept the recommended decision or appeal it. If the recommended decision is accepted in its entirety, OEDCA issues a final order to the complainant and the facility director. The final order outlines the relief (which may include compensatory damages, attorneys' fees, and costs) awarded to the complainant and any other corrective action the facility must implement. If OEDCA initiates an appeal of the entire decision or a portion of it, it issues a final order to the complainant and the facility director outlining its reasons for disagreeing with and rejecting the AJ's recommended decision.

If the complaint goes to OEDCA for a FAD and discrimination is found, OEDCA sends its decision to the complainant and facility director. As with a final order, OEDCA outlines the remedial relief awarded to the complainant and any other corrective action the facility must implement. If the complainant is entitled to compensatory damages, OEDCA will request that EO/OPC conduct a compensatory damages investigation. Upon completion of that investigation, OEDCA will issue a FAD on the amount of damages awarded to the complainant and, if the complainant is represented by an attorney, award attorney's fees.

How is management involved at this stage of the process? _____

Any decision from OEDCA is final and the parties must comply. Facilities must submit supporting documentation of compliance to EO/OPC. If OEDCA has initiated an appeal or partial appeal on a recommended finding of discrimination from EEOC, your facility will be instructed not to implement EEOC's recommended decision until an appellate decision

Discrimination Complaint Procedures

What happens when there is a finding of discrimination?

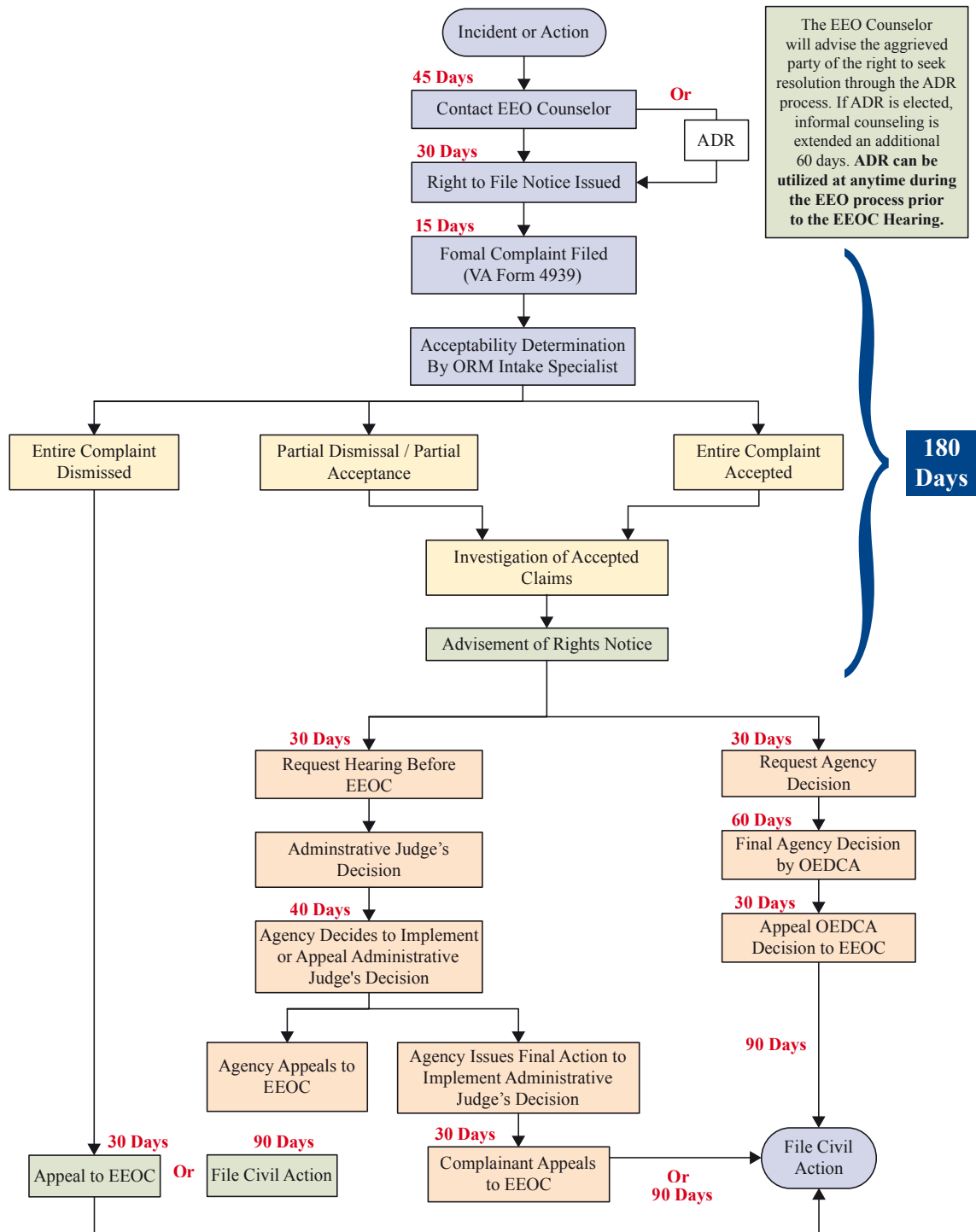
is received. Once an appellate decision is rendered, VA's Office of General Counsel provides a copy of the decision to the facility director with instructions to implement the required actions and submit a report of compliance to ORM. Any questions related to compliance issues should be directed to the EO/OPC.

Rights of Persons Involved in Discrimination Complaints

Party To The Complaint	Anonymity	Freedom From Reprisal	Representation	Preparation Time
Complainant	YES ³	YES	YES	YES
Complainant's Representative	NO	YES	N/A	YES
Responding Management Official (RMO)	NO	YES	YES	YES
RMO's Representative	NO	YES	N/A	YES
Witness	NO	YES	YES	YES
Facility-Based EEO Program Manager	NO	YES	YES	YES
Management Representative	NO	YES	N/A	YES
EEO Counselor	NO	YES	N/A	N/A
EEO Investigator	NO	YES	N/A	N/A

³ Only during informal counseling

EEO Complaint Process Flowchart and Timeframes



Alternative Dispute Resolution (ADR)

ADR is an interactive process in which a neutral third party engages the parties in dispute in an attempt to facilitate discussions and seek a mutually acceptable outcome to issues and concerns. It is a voluntary, highly effective, and less time-consuming approach than going through the regular stages of the EEO complaint process.

Unlike the traditional formal complaint process, where the parties involved in a dispute are placed in a contest to determine a “winner” or a “loser,” ADR provides an opportunity for individuals to examine their workplace concerns and develop unique solutions that are acceptable to all parties. Through ADR, participants can generally arrive at resolutions quicker than through the formal complaint process and resolutions are designed by the participants rather than by an outside person, e.g., a management official or a judge.

VA is committed to the appropriate use of ADR for resolving disputes in a timely, less costly, and less adversarial manner than litigation or administrative adjudication. The VA Administrations and staff offices should use ADR techniques as an alternative to litigation or formal administrative proceedings whenever it is feasible. VA’s policy is to encourage employees to use ADR to help resolve workplace disputes as early as possible, to the maximum extent practicable, in an appropriate and cost effective manner, and at the lowest organizational level.

WHO MAY USE ADR?

Any employee at any level may ask to participate in ADR. Mediation is the form of ADR most frequently used within the VA. If a dispute arises involving a coworker or supervisor, ADR may be requested whether or not a complaint, grievance, or personnel action has been initiated. Employees maintain the right to pursue more formal avenues as long as they comply with the specified timeframes of the specific complaint procedures, i.e., Merit Systems Protection Board, Office of Special Counsel or EEO.

HOW DOES MEDIATION WORK?

In mediation, a trained neutral mediator usually begins the session by explaining the procedures and ground rules. The participants are then invited to share information regarding the issues in dispute while the mediator provides structure, balance, and fairness throughout the discussion. The mediator may meet separately with each participant to discuss matters further and to develop possible options for resolution. Throughout the mediation process, the participants listen to each other's concerns and try to focus on the kind of future they can build together. Although an agreed-upon resolution between the parties is the primary goal, mediation is often considered successful if it results in a better understanding or relationship between the participants.

VHA, VBA, NCA, and other staff offices encourage employees to pursue available ADR options at the earliest possible time to help minimize the disruption and stress that often accompany a workplace dispute or EEO complaint. An employee or manager can start the process by contacting the facility's ADR program coordinator. If the employee is already in one of the formal dispute resolution systems, an opportunity to participate in ADR may be suggested as part of that system.

WHAT ISSUES MAY NOT BE APPROPRIATE FOR ADR?

The decision to use ADR calls for informed judgment. Employees' relationships, their interest in retaining control over the process, the need to move quickly, and the need for neutral involvement are factors to be weighed in deciding whether ADR is appropriate for a particular conflict. Certain cases may not be appropriate for ADR. When the following factors are present, a case-by-case determination must be conducted as to whether the matter is appropriate for ADR.

- An indication of fraud, waste or abuse;
- An allegation of patient abuse;

Alternative Dispute Resolution (ADR)

How do I learn more about ADR?

- An allegation of sustained, continuing sexual harassment;
- A removal for cause, e.g., removal based upon the commission of a felony.

HOW DO I LEARN MORE ABOUT ADR?

Contact ORM, your facility ADR Program Coordinator or your Human Resources office. You can find additional information about ADR at <http://vaww1.va.gov/adr/> or <http://www.va.gov/adr/>.

You may also contact Tracey Therit, ADR Director, at (202) 461-0235, or at tracey.therit@va.gov.

Settlement Agreements

WHAT HAPPENS WHEN AN EEO COMPLAINT IS SETTLED?

An EEO complaint can be resolved at either the informal or formal stage of the EEO process. Once a complaint is settled, ORM ceases processing the complaint at the stage it was when the agreement was reached, and the complaint is closed.

How is management involved in the settlement process? _____

Management Officials, or their designee, negotiate the terms and conditions of the agreement with the complainant and/or the complainant's representative. The facility director or designee is the only official with the authority to bind the agency to a settlement agreement. It is imperative that the director or designee signs the settlement agreement.

WHAT CONSTITUTES A VALID SETTLEMENT AGREEMENT?

In order to be a binding and valid contract, the settlement agreement must provide the complainant with an employment benefit that they are not already entitled to as a federal employee. This is called "adequate consideration." Examples of adequate consideration are providing additional training opportunities; expunging a disciplinary action from personnel records; financial compensation, or a reassignment to a different supervisor. Examples of provisions that do not provide adequate consideration are promising not to retaliate or discriminate against the complainant; promising to adhere to EEO regulations or to follow established policies and procedures. These examples do not provide adequate consideration because the agency is already required to do these things so there is no valuable consideration given to the complainant by agreeing to these terms.

Settlement Agreements

What happens if a complainant believes the settlement agreement has been breached?

WHAT HAPPENS IF A COMPLAINANT BELIEVES THE SETTLEMENT AGREEMENT HAS BEEN BREACHED?

If a complainant believes that the agency has not honored the provisions of the settlement agreement, they may notify the Deputy Assistant Secretary for Resolution Management, in writing, within 30 calendar days of the alleged breach of the settlement agreement. EO/OPC will issue a decision regarding whether or not the settlement agreement was breached.

How is management involved in a breach of the settlement agreement claim?

EO/OPC will contact the facility to request information regarding the implementation of the terms of the agreement, and also ask for compliance documentation in order to determine if the promises made in the settlement agreement have been satisfied. The response to the request for information should be made by individuals that have knowledge of the creation and implementation of the settlement agreement.

HOW TO AVOID BREACHING A SETTLEMENT AGREEMENT AND HAVING AN EEO COMPLAINT REINSTATED

- Ensure that the terms and conditions of the settlement agreement contain adequate consideration, and that the provisions are stated specifically to include who will do what, when, and how.
- Ensure that the facility EEO Manager monitors compliance with the implementation of the settlement agreement in a timely manner.
- Ensure that the time limits to comply with the settlement agreement are met.
- Ensure that the individuals that have the responsibility to implement the terms of the agreement, such as Human Resources and Fiscal Service

officials, are aware of what needs to be accomplished, and their role in fulfilling the terms of the agreement in a timely manner.

- Ensure that if the terms of the settlement agreement require the removal of personnel records, that all Human Resources records (i.e. hard copy Official Personnel Files and electronic Official Personnel Files) are purged.

For additional information regarding the creation and implementation of settlement agreements, please contact EO/OPC, at (202) 461-0200.

Organizational Climate Assessment Program (OCAP)

HOW CAN HIGH PERFORMING ORGANIZATIONS KEEP COMMITTED AND ENGAGED EMPLOYEES?

To retain committed and engaged employees, organizations must understand what matters most to their employees. People who are satisfied with their work environment tend to be more motivated, creative, and productive. ORM offers the Organizational Climate Assessment Program (OCAP) to VA organizations with the primary goal of helping leadership measure employees' satisfaction in their workplace.

OCAP assists VA organizations with understanding the dynamics of work environments by analyzing data gathered through surveys, focus groups, individual interviews, and reviews of labor and human resources activities. It also serves as a tool in complaint prevention and early resolution.

This proactive approach captures the voice of the employees and provides feedback that leaders can act on. This will result in such benefits as enhanced leadership, enhanced strategic planning, collaborative efforts, more effective communications, and employee teamwork.

WHY AND HOW DO I REQUEST AN OCAP ASSESSMENT AND WHAT ARE THE COSTS FOR THE ASSESSMENT?

Request an OCAP Assessment

There are many reasons why someone would request an OCAP Assessment. Most senior managers want to know how their employees perceive the various facets of their organization in a non-threatening and positive assessment of their organization. We encourage new senior managers to request an OCAP Assessment so they have a good understanding about their new organization and address possible weaknesses early on. Sometimes an OCAP Assessment may be requested by the facility's Administration to address concerns, such as a high level of EEO complaint activity. To request an OCAP Assessment, please call (909) 801-5166.

Who pays for the costs of an OCAP Assessment?

There are no direct costs to the organization for conducting an OCAP Assessment. ORM pays for the moderators' travel costs and incidental expenses. ORM may request an organization to assist with expenses.

WHAT ARE THE TOOLS USED BY ORM'S OCAP TEAM?

OCAP uses *four* methods to assist in the assessment of organizations:

- **Web-Based Climate Survey:**

Through this survey, OCAP obtains input from a cross-section of employees about the environments in which they work. The goal is to encourage candid responses, so the survey is voluntary and confidential. The survey is electronically distributed to all employees, and the comments are not attributed to any individual. Drawing similarities between the responses to survey questions and the responses to focus group questions provides data for consistent quantitative and qualitative analysis.

- **Focus Groups:**

Focus groups are carefully organized interviews led by trained and skilled moderators. Employees are randomly selected and participation is voluntary. The groups are designed to encourage individuals to share perceptions, opinions, and thoughts about their work environment in a structured and non-threatening discussion.

- **Individual Interviews:**

Executive leaders, select management officials, EEO and HR Managers, and union officials are interviewed to obtain their perceptions of the workplace environment.

- **ADR and EEO Complaint Activity:**

Data from ADR and EEO complaint activity are reviewed to identify significant systemic patterns and trends that suggest problems in the work environment.

Organizational Climate Assessment Program (OCAP)

What is an OCAP Moderator and how does one become a moderator?

WHAT IS AN OCAP MODERATOR AND HOW DOES ONE BECOME A MODERATOR?

OCAP Moderators

Trained OCAP Moderators are the key to a successful assessment. The collateral duty moderators' main responsibility is to participate in the on-site portion of the OCAP assessment at the facility. A list of available moderators is updated frequently, and volunteers are sought for each assessment. The number of moderators that participate in the on-site portion of the OCAP assessment varies between two and six, depending on the type of facility and the number of employees that work at that facility.

OCAP Moderator Training

ORM relies heavily on the support of collateral duty moderators from the Administrations. Before anyone can participate as an OCAP Moderator, they will participate in a two to three day moderator on-site training course. Once they have completed the training, they are paired with experienced moderators to hone their skills. If someone wished to volunteer for the training and participate in OCAP assessments, they can contact OCAP at (909) 801-5166. Training is usually conducted once or twice a year and is based upon the need to sustain a sufficient number of active collateral duty moderators.

Organizational Climate Assessment Program (OCAP) What are the Benefits and Outcome of an OCAP Assessment?

WHAT ARE THE BENEFITS AND OUTCOME OF AN OCAP ASSESSMENT?

Benefits	Outcome
<ul style="list-style-type: none">▶ Identify best practices▶ Identify root cause of workplace disputes▶ Provides feedback to assist with strategic planning▶ Explore other issues that are important to employees▶ Open lines of communication▶ Identify training needs	<ul style="list-style-type: none">▶ Increased productivity▶ Enhanced morale and employee satisfaction▶ Reduced number and cost of EEO complaints, union grievances, and other disputes▶ Improved quality of service to Veterans▶ Create “Employer of Choice” environment▶ Enhance knowledge and skills of employees▶ Accomplish recruitment goals

For More information, please contact Executive Operations OCAP Manager (909) 801-5166.

Most Common Findings of Discrimination to Avoid

Harassment (Non-Sexual)	Avoidance
<ul style="list-style-type: none"> ▶ Inconsistent application of rules and regulations ▶ Using racial epithets and prohibited bias ▶ Demonstrating offensive behavior ▶ Failure to take action when put on notice ▶ Denial of leave, consistently ▶ Assignment of duties ▶ Denial of training, consistently ▶ Close scrutiny of employee 	<ul style="list-style-type: none"> ▶ Take immediate action when workplace disputes arise ▶ Apply all rules and regulations equitably, such as leave and attendance ▶ Assign job assignments on the terms and conditions as similarly situated employees ▶ Approve training on the same terms and conditions as similarly situated employees ▶ Commensurate the level of supervision with performance ▶ Treat employees as you expect to be treated
Reprisal	Avoidance
<ul style="list-style-type: none"> ▶ Targeting employees who participated in prior EEO activity 	<ul style="list-style-type: none"> ▶ Do not make disparaging remarks or idle threats regarding participation in EEO activity ▶ Do not interfere or discourage an employee's right to participate in the EEO process ⁴

⁴ The Equal Employment Opportunity Commission has found that this constitutes a per se violation. A per se violation in this instance is any action or statement by management officials that might dissuade employees from engaging in protected activity.

Most Common Findings of Discrimination to Avoid

Reasonable Accommodation	Avoidance
<ul style="list-style-type: none"> ▶ Failure to accommodate specific needs ▶ Denial of leave for medical reasons ▶ Denial of specialized equipment and/or furnishings ▶ Assignment of duties that exacerbates the disability ▶ Denial of accommodating work space ▶ Accessing employee's medical record without authorization 	<ul style="list-style-type: none"> ▶ Be knowledgeable of the Americans with Disabilities Act of 1990 and Rehabilitation Act of 1973 ▶ Educate self and staff; participate in reasonable accommodation training ▶ Engage in interactive communications with employees with disabilities to determine entitlement and appropriate accommodation ▶ Do not violate HIPPA and the Privacy Act⁵
Sexual Harassment	Avoidance
<ul style="list-style-type: none"> ▶ Failure to take action promptly ▶ Failure to exercise reasonable care to prevent and correct sexual harassment ▶ Repeated inappropriate sexual remarks and jokes 	<ul style="list-style-type: none"> ▶ Even when the victim request no action management is obligated to intervene ▶ Once put on notice act immediately ▶ Do whatever to end sexual harassment and prevent reoccurrence ▶ Acting too late is just like not acting at all ▶ Do not allow, condone, or participate in inappropriate sexual banter

⁵ The Equal Employment Opportunity Commission has found that this constitutes a per se violation. A per se violation in this instance is any unauthorized person accessing an employee's confidential medical records.

Frequently Asked Questions

Retaliation/Reprisal

The Equal Employment Opportunity Commission (EEOC) reports that retaliation is the most frequently alleged basis of discrimination in the Federal government. An employer is prohibited from taking an adverse action based on an employee's prior EEO activity. What lessons can VA managers learn from recent EEOC decisions to prevent findings of discrimination? The scenarios below reflect cases where VA was found to have committed a per se violation or retaliated against an employee. Per se retaliation/reprisal is an automatic violation of the law against reprisal that does not require evidence of an "adverse action." Per se violations occur when management officials make negative comments or take action against an individual who participates in the EEO process in any capacity. The responses to the following scenarios can be used as a valuable tool to assist managers in preventing and eliminating retaliation/reprisal and other forms of discrimination in the workplace.

- 1. I was in the midst of approving the reassignment of an employee to a different position when I received a call from an EEO counselor indicating that the employee had initiated an EEO complaint against me. I am not sure what the complaint is about, so I will deny the reassignment until I learn what the complaint is about because I do not want it to appear that I am moving her because she has filed an EEO complaint. Was this the right thing to do?***

Delaying actions after an employee initiates an EEO complaint can be viewed as retaliation/reprisal. Managers should always ask themselves "Would I take this course of action if the employee did not have a complaint?" If the answer is no, then the action is not advisable, as it sends a message that because an employee used the EEO process, management may take a retaliatory action against them. The motivation to take or not to take an action based on an employee's participation in the EEO process constitutes prohibited retaliation/reprisal in violation of Title VII of the Civil Rights Act.

Provisions of Title VII of the Civil Rights Act that govern retaliation/reprisal are broad and make discrimination against an individual because of his or her protected EEO activity, unlawful. These

provisions prohibit any discrimination that is reasonably likely to deter a complainant from participating in protected EEO activity.

- 2. Carol has filed an EEO complaint and the case is scheduled for a hearing. She alleges that I discriminated against her when she was placed on absent without leave (AWOL). I just learned that Carol is going to call Donna as a witness. I hired Donna a couple of months ago; she is a recent college graduate and has no clue about what goes on in the Federal workplace. Is it ok for me to warn Donna that Carol is a troublemaker and that she “crossed the line” when she filed her complaint?**

It is always inappropriate (and illegal!) for a supervisor or other VA management officials to dissuade an employee from participating in the EEO process, including testifying for, or serving as a representative on behalf of a complainant. It is also illegal for VA management officials to suggest or infer that an employee who files an EEO complaint is a “troublemaker”.

Witnesses who testify in EEO hearings are protected from retaliation/reprisal by VA management officials. Depending on the circumstances, a potential witness may also be protected if she is the target of an adverse action by her supervisor or other management official as a result of being identified as a potential witness. Targeting can take many forms including issuing a letter of warning, lowering a performance evaluation, denying a leave request, or non-selection for promotion.

- 3. I was on a selection panel for a motor vehicle operator position. I attended a meeting with Human Resource officials regarding the selection process where the applicant’s prior EEO activity was disclosed as well as the qualifications of both candidates. The panel found both candidates to have similar qualifications; however, not all members agreed on what type of experience was the most valuable and gave credit to each candidate using different job experiences. The panel also discussed their concern that one of the employees had a prior history of filing EEO complaints which could lead to future**

complaints. Therefore, the other candidate was selected. Was it appropriate to discuss the employee's prior EEO activity while determining the best applicant for the position?

An individual's prior EEO activity must never be discussed or considered when determining the best qualified candidate for a position. In essence, an individual's EEO activity should not be shared at all during the selection process. Selections must be based on merit principles; a review of the qualifications required for the position, and each candidate's ability to meet those qualifications as evidenced by their work history. The Civil Service Reform Act (CSRA), codified (5 U.S.C. Section 2301) the basic merit principles governing Federal personnel management. These principles specify that selection and promotion should be based solely on merit, after fair and open competition.

Further, trying to justify a selection decision by simply stating that the selectee was "better qualified" absent a clear and specific explanation may result in a finding of discrimination, particularly, when it appears, at least on paper, that the candidate that was not selected actually had superior qualifications. For example, management should be able to articulate what skills, abilities, and experience the selectee had to make them better qualified to perform the duties of the position. An inference of retaliation/reprisal arises when there is proof that the protected EEO activity and the adverse action taken against the employee are related. This inference may arise even if a significant amount of time has elapsed between the protected activity and the adverse action if there is other evidence that points to retaliation/reprisal. Even if management produces evidence of a legitimate, nondiscriminatory reason for the action at issue, a violation could still be found if this explanation is a pretext designed to hide the true retaliatory motive.

- 4. Steve, one of my subordinates, keeps filing EEO complaints. He is always spending time in Human Resources, but otherwise is an excellent employee. I want to put something in his performance evaluation to reflect how much time he is spending on his EEO complaints. Can I do this?***

An employee's EEO activity has no relationship to his work performance. Statements about EEO activity may constitute per se retaliation/reprisal and must not be included in VA performance evaluations. Likewise, it is illegal to provide an employment reference that identifies, discusses, or offers an opinion about an individual's EEO activity.

VA employees are entitled to a "reasonable amount of official time" to pursue their EEO complaints. An employee who serves as a complainant's representative is also entitled to official time. For further guidance about what constitutes a "reasonable amount of official time" contact your local EEO Program Manager and/or Regional Counsel.

- 5. In October 2009, Marcus, a Food Service Leader, who is one of my employees, participated in EEO activity. He had expressed his concern to me that there was a difference in assignments given to older and younger employees. In June 2010, Marcus contacted an EEO counselor and alleged that I assigned him less desirable work more often than his co-workers in retaliation/reprisal for his prior EEO activity in October 2009 and contrary to the agency's policy. I attest that Marcus' assignments were made for business related purposes. Is there something wrong with using my own judgment rather than relying on agency policies?***

Management's reason was found to be pretextual because the employee's assignments violated agency policy. Pretext means that the explanation given by management is just an excuse and not the real reason for the action taken.

It is important for management officials to follow agency policy and not deviate from it when carrying out personnel actions without justifiable and credible reasons. It may raise red flags, if an EEO complaint is filed, particularly, by an employee who has previously filed. In this case, the manager did not specifically answer why Marcus received more of the less desirable jobs; more to the point, how did this turn of events relate and/or impact the business that

led to Marcus' receipt of more of the less desirable assignments? Management must also be able to articulate a legitimate non-discriminatory reason (i.e., state the business case) for its actions. It is possible that if management had provided a detailed reason explaining the deviation of assignments from the usual policy, the result may have been different. In any event, this situation highlights the fact that managers need to be careful not to depart from normal procedures.

Note: Failure to follow agency's procedures led to this finding of retaliatory discrimination. Many employees, after having filed a discrimination complaint almost always believe that any negative or suspect action taken against them afterwards is retaliatory.

- 6. Last month I removed Tina during her probationary period and she filed a discrimination complaint against me. Jack is one of my subordinates and Tina's friend. I expect loyalty from my staff and I don't want Jack helping Tina with her complaint. Since Jack works for me, can I tell him not to assist Tina with her complaint?**

Third parties participating in the EEO process are protected from retaliation/reprisal even if they do not feel that they are personally discriminated against. Participation may include assisting an aggrieved employee with her complaint by participating in an investigation or providing a written or oral statement in support of the employee. Thus, it is illegal for a VA supervisor or other management official to advise subordinate staff that they cannot assist a co-worker with her complaint.

However, there are VA policies governing the use of official time for such purposes. To access the "Official Time" guidance, please visit: <http://vaww4.va.gov/orm/departments/LR/ormlr/toolboxes/docs/OTFAQS.pdf>. VA supervisors and management officials must not discuss an employee's ongoing EEO activity with subordinate staff, unless the staff member is involved in processing, investigating, mediating, or litigating the complaint. Management officials must cooperate in the EEO process including investigations. Failure to

cooperate in an EEO investigation may lead to disciplinary action, up to and including removal.

- 7. *If an employee filed a previous EEO complaint against me, and subsequently, complains to me that another co-worker is telling insensitive jokes in his/her presence, and I don't think the jokes are insensitive at all. What should I do since the jokes were not directed at the employee who complained?***

Whether or not you believe the jokes were insensitive, management has a responsibility to immediately address the issue. Management is under an obligation to do whatever is necessary to end harassment and prevent misconduct from recurring regardless of whether or not the employee who raised the concern has previously filed an EEO complaint, or whether or not management regards the employee as overly sensitive. Management can be found liable for retaliation/reprisal if they fail to exercise reasonable care to prevent retaliatory harassment. Incidents of harassment must be addressed promptly. Failure to take corrective measures in a timely fashion can result in a finding of discrimination, in so far that acting too late is the equivalent of not acting at all. It is advisable that management meet with the employee and share the conclusion after looking into the matter. VA managers and supervisors have a special responsibility in maintaining a work environment free from discrimination and harassment. All VA managers and supervisors are required to complete mandatory training in EEO, Diversity, and Conflict Management every two years. This training can be found using the Talent Management System at <https://www.tms.va.gov/plateau/user/login.jsp>. If you complete the training using this method, it satisfies the every two year requirement.

- 8. *Sam went to the union alleging that Nancy was sexually harassing him. I supervise both Sam and Nancy. I think Sam is making this whole thing up. I want to tell the union that Sam better be telling the truth, because if he is not, I am going to take disciplinary action against him. Should I do this?***

It is illegal for VA supervisors and management officials to make statements or engage in conduct that might cause an employee to refrain from engaging in protected EEO activity. Such statements or actions constitute “per se retaliation/reprisal” and are an automatic violation of anti-discrimination laws. A finding of discrimination involving “per se retaliation/reprisal” does not require evidence that the VA discriminated against the employee. When VA supervisors and management officials engage in “per se retaliation/reprisal, by making statements that intimidate or threaten disciplinary action, it has a chilling effect on employees’ rights to participate in the EEO process or voice opposition to discriminatory practices. The EEOC has determined that retaliation/reprisal harms the public interest by deterring others from filing complaints.

- 9. An employee filed a prior EEO complaint against me for counseling her regarding her time and attendance. Shortly thereafter, she was issued a letter of admonishment suspending her supervisory duties pending an investigation into patient abuse. Although the investigation did not reveal patient abuse occurred, I did not remove the suspension until six months later, because I forgot. Should I have removed the suspension immediately upon learning of the results of the investigation since that is the policy of the department?***

There was no justifiable reason to continue to suspend the employee’s supervisory duties after it was learned that no patient abuse occurred. The purpose of an Administrative Investigation Board is to determine whether or not misconduct occurred through the examination of relevant evidence, to include both testimonial and documentary. The evidence compiled during the investigation can be used to form the foundation of disciplinary and/or adverse action if it is discovered that misconduct has been committed. If, alternatively, no misconduct is evident, no further action need be taken against an employee, particularly when to do so, would be contrary to policy and common practice.

Managers should be mindful that employees are very sensitive to any actions management takes against them, after they have filed an

EEO complaint. It is always a good practice to be certain that actions taken against an employee after an EEO complaint has been filed, is warranted and the complainant is treated the same as any other employee in a similar situation.

10. *Kevin filed a complaint saying that I discriminated against him because of his religion. I am personally offended by his statements. Can I tell him how I feel?*

No supervisor or manager likes when an EEO complaint is filed identifying him/her as the individual responsible for the action alleged to have been discriminatory. You may feel offended, angry, or disappointed that a member of your staff would take such an action. However, it is never appropriate for VA managers and supervisors to publicly express hostility toward the EEO complaint process or the employee who filed the complaint. Such statements often are found to be “per se retaliation/reprisal,” as discussed above. If you feel personally offended or hurt that a complaint has been filed against you, discuss your feelings with the EEO Program Manager or Regional Counsel.

11. *An employee in my section alleges I retaliated against her when I sent an email to all of the employees in my department asking them for statements I could use to defend myself against an EEO complaint she had filed against me. Were my actions inappropriate?*

Anti-retaliation/reprisal provisions protect individuals from any actions that would likely discourage a reasonable person from participating in the EEO process. These actions are not limited to actions that are typically considered to be adverse in nature, such as disciplinary or performance based actions. They may take the form of any management decisions or actions that interfere with an employee’s ability to pursue a complaint.

Managers must avoid creating an atmosphere in which employees are reluctant to exercise their EEO rights for fear of retaliation.

After reviewing the facets of this case, management's e-mail to several employees in the section was the type of conduct reasonably likely to deter and dissuade individuals from engaging in EEO protected activity. Therefore, this action constituted prohibited reprisal discrimination.

- 12. *An employee filed an EEO complaint against me and several months later, submitted an untimely leave request for 40 hours. The leave request was submitted two days before the leave was to begin. In accordance to the leave policy, employees are to request leave at least two weeks in advance to ensure there is proper staff coverage and pending projects are completed. I have held all employees accountable for following this procedure. I met with the employee to explain that her leave is denied because she failed to follow proper leave procedures and her request conflicts with the second extension granted to complete the John Doe project. The employee was dissatisfied with my decision and took the leave anyway. Upon her return, I issued her a letter of admonishment, which disclosed that she was carried in an absent without leave status, because she was AWOL. The employee said that she did not agree with the admonishment. She believed that I was retaliating against her, because she previously filed an EEO complaint against me. Should I have issued her the letter of admonishment or ignored the fact that she took the leave without approval and not have disciplined her for fear of perceived retaliation?***

Consistent with a manager or supervisors role and responsibilities, management should not avoid taking appropriate corrective action(s) against employees who have filed previous EEO complaints against them, if there is a legitimate, lawful, objective reason for taking such action.

To avoid the appearance of giving preferential treatment, management has an obligation to enforce policies and procedures equitably. By enforcing employees to adhere to leave policies, it helps

managers and supervisors better administer the workload to prevent undue hardship on the organization and other employees.

- 13. *Next month I will become the Director of the “Any Town USA, VA Medical Center”. This is my first supervisory assignment and I want to make a difference. Everyone knows that this facility is dysfunctional and has had a lot of EEO activity during the past three years. I am holding an “All Hands” meeting when I arrive. Can I tell employees that we need to reduce our EEO complaints, if we ever want to win an award for organizational excellence?***

When VA managers and supervisors publicly discuss the EEO process, their focus should be on their strong commitment to equal employment opportunity, diversity and inclusion, and workplace dispute resolution. Every supervisor and manager bears a special responsibility to ensure that discrimination is not tolerated in VA and that diversity is valued.

On an annual basis, you and your staff should review VA’s workplace policies dealing with EEO, diversity and inclusion, and discuss the expectations of these policies. If you need additional assistance in facilitating such a discussion, contact your local EEO Program Manager.

10 Steps to Help Prevent an EEO Complaint

ORM exists to serve its stakeholders. We are constantly seeking ways to reduce EEO complaints. There are proactive steps that a manager can take to reduce the likelihood of EEO complaints, while improving employee morale and productivity.

1. Open Lines of Communication:

Promote open, two-way communication throughout your organization. Encourage managers, supervisors, and employees to discuss their problems and concerns before they escalate into a dispute and possibly an EEO complaint. A good example is when a selecting official makes a sound selection. The person selected is indeed the most qualified and is the best candidate, based upon objective, professional standards; however, the selecting official may fail to recognize and respond to tell-tale concerns of non-selected employees.

No one likes to be doubted or questioned. However, by explaining to non-selected employee why they were not selected and recommending ways to improve their chances at the next opportunity, the selecting official is acknowledging the natural disappointment of non-selected employees and defusing a potential complaint.

Another example is the reality that supervisors and managers become so busy, they often fail to take steps to address performance-related issues when they are minor and only react when the issues become major. Without communication and immediate corrective action, employees may be unaware that they are not performing at the appropriate level.

2. Train... Train... Train... :

Train your managers, supervisors, and employees. ORM strongly encourages EEO-related training in areas such as diversity, ADR, and the EEO complaint process. Train all employees in appropriate and acceptable behavior. A fully trained staff will be better able to resolve disputes and manage your resources effectively.

3. Enforce Zero Tolerance:

Clearly demonstrate to your entire organization that illegal discrimination is unacceptable and will not be tolerated. Clearly display EEO policies where all employees can read them, including those employees who require accommodation and when violations do occur, take immediate action to correct the situation and prevent recurrence.

4. Support Cultural Diversity:

Encourage, actively support, and personally participate in cultural diversity events in your organization. Acknowledge the uniqueness of different cultures and lead your staff in accepting diversity as a positive, life-enriching experience. It is also important to appreciate and encourage diversity through personnel actions. Always seek quality and diversity in your organization.

5. Support EEO Committees:

Make sure that you have active and fully supported EEO and Reasonable Accommodation Committees. Members of EEO Committees can often relay concerns to other members and management before they become major issues. This can act as a positive and diverse experience for the workforce.

6. Utilize ORM and Facility-based EEO Officials:

Look for opportunities to benefit from the expertise of your facility EEO officials, such as your ADR Coordinator and EEO Manager. They are valuable resources to help you identify and resolve disputes, as well as identify affirmative efforts that can be taken to ensure a diverse workforce. ORM offers some excellent training tools such as Root Causes of Workplace Disputes DVD and Organizational Climate Assessment Program (OCAP).

7. Seek Early Resolution and Take Advantage of ADR:

Resolve complaints at the earliest possible moment by bringing parties together to help understand and settle their differences. Keep in mind that ADR is a perfect tool for reducing the number

10 Steps to Help Prevent an EEO Complaint

of complaints and avoiding future complaints. While ADR is offered by ORM throughout the complaint process, that does not limit a leader from taking advantage of ADR earlier. Employees may approach management requesting assistance regarding a possible EEO complaint. This may be a perfect opportunity to resolve the matter-before it turns into a complaint or grievance.

8. Recognize That the Process Can Be Abused:

Accept the reality that some employees are going to abuse the EEO process. EEOC has added a provision to its regulations to dismiss complaints that are frivolous or are intentional attempts to “clog” the EEO process. This provision has very limited applications, and the threshold to request a dismissal is very high. Remember, the vast majority of complainants truly believe that they have been discriminated against, regardless of what a management official believes.

9. Hold Subordinates Accountable:

Hold subordinate managers and supervisors accountable for their actions. When senior managers do not follow through to discipline inappropriate or unprofessional behavior, employees will feel that such behavior is tolerated-or even approved. If the inappropriate behavior is allowed to continue, it becomes a feeding ground for EEO complaints, especially complaints of harassment.

10. Monitor Complaint and Diversity Trends:

Monitor complaint and diversity trends within your organization. If you see numerous harassment complaints coming from one particular sector, that probably signals a need for some type of managerial or professional intervention.

Root Causes of EEO Complaints DVD

A MANAGER'S TOOL TO UNDERSTAND WHY EEO COMPLAINTS MAY BE FILED

ORM developed a video featuring six three-to-five minute vignettes, which depict dramatizations of workplace disputes that led to EEO complaints. They represent the most identified complaint driven disputes that result in employment discrimination complaints. This “Root Causes of Workplace Disputes” DVD demonstrates the value of identifying the causes of EEO complaints. The DVD helps educate VA employees on the benefits of recognizing and becoming acquainted with the most common root causes of workplace disputes and what could have been done differently to effectuate a positive resolution and change. The vignettes are designed to help managers recognize potential problems before they become complaints. The theory is that if managers understand the practices, conduct, and behavior that cause an employee to initiate and ultimately file an EEO complaint, they can educate the employees, provide the stimuli to promote modification in behaviors, effectuate change in behaviors, and prevent recurrences of situations that result in EEO complaints, as well as help foster more efficient, effective, and positive communications in the work environment.

TITLES OF THE SIX VIGNETTES

Inappropriate Comments

Training Denied

Harassed by Co-Worker

Non-Selection

Incomplete Project

Modified Proficiency Report

The Root Causes of Workplace Disputes Video can be viewed on ORM's website: <http://vaww4.va.gov/orm/>.

Copies of the DVD are available by contacting: EO/OPC — (202) 461-0200.



WHAT IS ADVANCE?

ADVANCE is a VA-wide initiative to invest in people development, workforce engagement and talent management for the improved delivery of healthcare, benefits and other services to Veterans and their families. It is led by the Office of Human Resources and Administration.

ADVANCE is an exciting new direction for the Department, for Veteran's services and for your career. ADVANCE is an unprecedented, long-term investment in the professional and personal growth of each and every VA employee nationwide. It will provide you and other VA employees, the tools, training and support necessary to advance your career and improve services to Veterans and their families.

If you have any questions you can call 1-888-56-NEW VA (1-888-566-3982) or visit their website at <http://vaww.va.gov/ADVANCE/index.html>.

Human Capital Investment Plan Initiatives

VA has undergone a transformation. In support of this transformation, ORM has implemented the following initiatives under the auspices of HCIP/ADVANCE.

RESOLUTION SUPPORT CENTER

ORM's aggressive implementation timetable enabled the Resolution Support Center, a call center designed as a one-stop source for HR-related information for employees and managers, to support the kick-off of ADVANCE and Wellness is Now (WIN) by responding to more than 3,200 calls and e-mails. The ADVANCE initiative provides VA employees with the training and professional services necessary to perform their jobs at a high level and to advance their careers. WIN is a health-related initiative consisting of online programs and services to help employees meet their wellness needs and goals. In 2011, the Resolution Support Center will provide information to VA managers and staff about addressing workplace disputes and responding to concerns about VA's other initiatives. RSC can be reached toll free at 1-888-56-NEW VA (1-888-566-3982).

ADR FIELD SUPPORT

Eight new alternative dispute resolution (ADR) specialists have joined ORM to work directly in VA field facilities: six located in VISNs around the country, and two in Central Office. Until now, ADR services in the field were provided by collateral duty mediators and contractors. The new staff provides full-time ADR services and education.

CONFLICT MANAGEMENT TRAINING

The best way to stop the escalation of conflict in the workplace is to identify it early and address it immediately. ORM's initiative to train senior leaders in conflict management and ADR is designed to do just that. The classroom training, which has received excellent participant evaluations, promotes leadership skills in the areas of effective communication, negotiation,

and problem solving. Our objective is to reach all VA's senior leaders over a two year period. This fiscal year approximately 200 senior executives were trained.

ELECTRONIC DASHBOARD

The Electronic Dashboard initiative is designed as an information system that provides ready access to key EEO data and complaint and ADR information for managers and supervisors. It gives management insight into the health of their workplace and ability to monitor success of their efforts to promote diversity, increase ADR participation, and reduce complaints. ORM piloted the Electronic Dashboard in three VISNs in 2010, and plans to fully implement it throughout VA in 2011.

Office of Diversity and Inclusion (ODI) People with Disabilities Program

The VA is committed to increasing the representation of qualified people with disabilities in all levels of its workforce. The VA's People with Disabilities Program is designed to ensure that individuals with disabilities enjoy equal opportunity in all aspects of employment within VA, including intern programs, promotions, training, and reasonable accommodation.

The Disability Program at VA is part of our effort to address the low employment rate of individuals with disabilities, especially those with targeted disabilities. The targeted disabilities are: blindness, deafness, missing limbs, partial paralysis, total paralysis, dwarfism, psychiatric disorders, intellectual disabilities, and epilepsy. VA's National Disability Program is part of the Outreach and Retention Team, Office of Diversity and Inclusion (ODI).

DISABILITY ACCOMMODATION PROCEDURES

Section 501 of the Rehabilitation Act requires agencies to provide reasonable accommodation to qualified applicants and employees with disabilities. A "reasonable accommodation" is a change in the work environment or in work processes that enables a qualified to enjoy equal employment opportunities. The accommodation must be effective in meeting the needs of the individual by addressing the barrier created by the functional limitations. VA's procedures for responding to requests for reasonable accommodation can be found in VA Handbook 5975.1, "Processing Requests for Reasonable Accommodation" <http://www.diversity.va.gov/programs/pwd.aspx>.

ACCOMMODATIONS

Most accommodations have no cost. Others are obtained for free from the U.S. Department of Defense's Computer/Electronic Accommodation Program (CAP) by visiting their website at: <http://www.tricare.mil/cap/>.

Accommodations, such as interpreters and readers that are not provided by CAP must be obtained by the employee's office, but the cost will be reimbursed from the Centralized Fund managed by the ODI. The goal of this fund is to ensure that VA applicants and employees with disabilities receive an accommodation they need to apply for a job, perform the essential duties of the job, or enjoy the benefits and privileges of employment.

For further information, please visit the ODI website at:
<http://www.diversity.va.gov/programs/pwd.aspx>, or call: (202) 461-4131.

Office of Resolution Management (ORM)

Training and Services Catalog

ORM is responsible for preventing, resolving, and processing EEO complaints. ADR processes such as mediation and facilitation are used throughout VA to address workplace concerns at the lowest possible level. To support VA administrations and staff offices in managing conflict, resolving disputes, and complying with EEO laws, ORM provides training, mediation, facilitation and other services. ORM's training catalog describes the courses and services available to VA managers, employees and union officials. To access this catalog, please visit: <http://vaww4.va.gov/orm/docs/CourseCatalog.pdf>, or call (727) 540-3951.

MANDATORY EEO TRAINING

All employees: Prevention of Workplace Harassment/No Fear Act (TMS Course Number VA 8872).

Supervisors/Managers: EEO, Diversity, and Conflict Management Training for Managers and Supervisors (TMS Course Number VA1328672).

To complete these courses, please visit the VA Talent Management System (TMS) at: <https://www.tms.va.gov/plateau/user/login.jsp>.

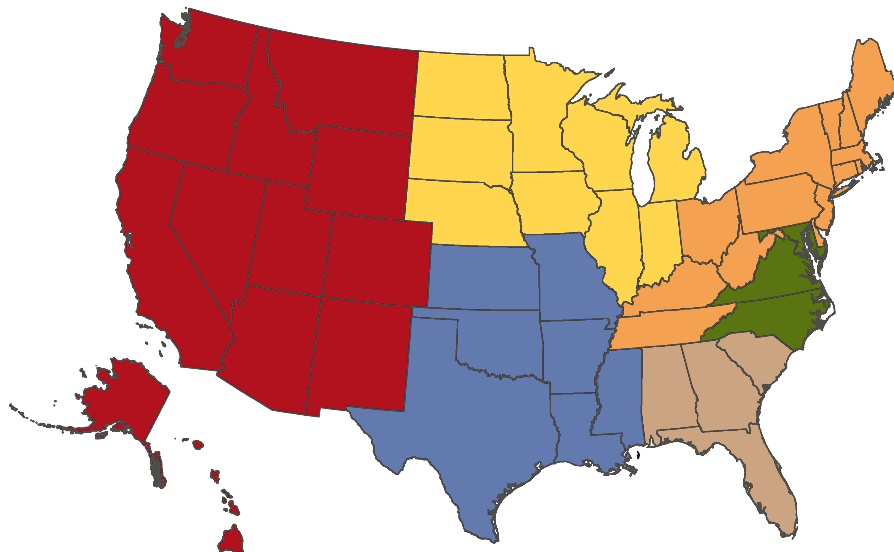
Contacting ORM

Office of the Deputy Assistant Secretary for Resolution Management
Washington, D.C. 20420
(202) 461-0280

Executive Operations
Washington, D.C. 20420
(202) 461-0280

Toll Free Line: 1-888-737-3361 (1-888-RES-EE01)
TTY/TDD: 1-888-626-9008

ORM FIELD OFFICES AND GEOGRAPHIC JURISDICTIONS



Western District

Western Operations
Los Angeles, CA
(310) 268-3586

Central Plains Operations
Houston, TX
(713) 794-7066

Great Lakes Operations
Hines, IL
(708) 202-7072/7068

Eastern District

Mid-Atlantic Operations
Washington, DC
(202) 461-0276

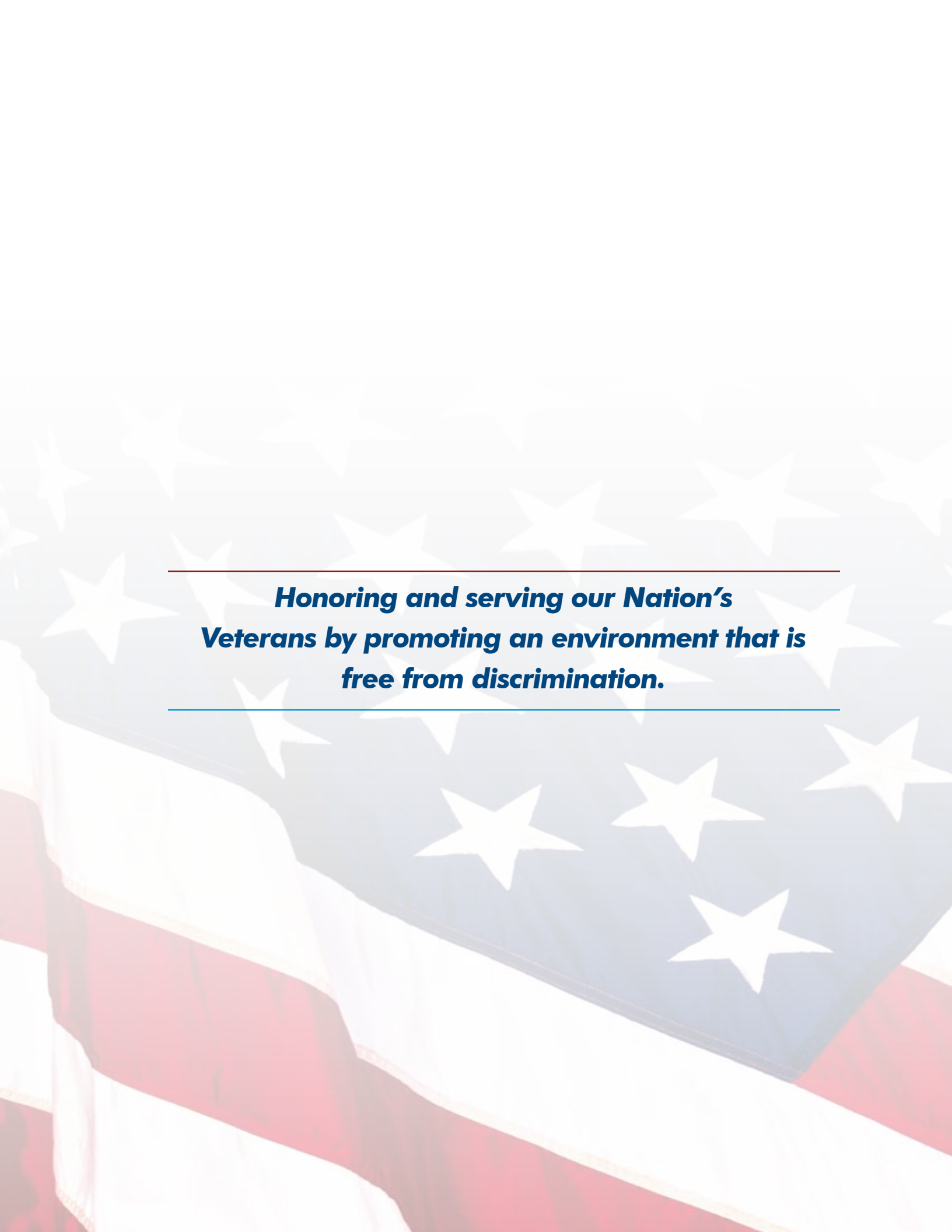
Northeastern Operations
Lyons, NJ
(908) 604-5349/5350

Southeastern Operations
Bay Pines, FL
(727) 540-3971

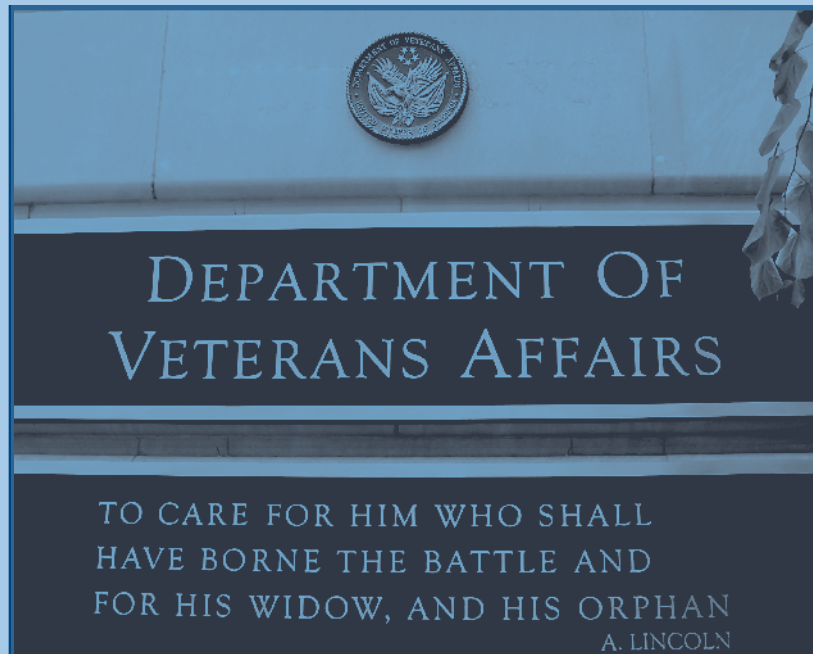
**Don't forget to
visit us on-line at:**

[http://www.va.gov/
orm](http://www.va.gov/orm) (Internet)

[http://vaww4.va.gov/
orm](http://vaww4.va.gov/orm) (Intranet)

A faded, high-angle view of the American flag, showing the stars and stripes. The flag is draped, creating soft folds and shadows. The stars are white on a blue field, and the stripes are red and white.

***Honoring and serving our Nation's
Veterans by promoting an environment that is
free from discrimination.***



Department of Veterans Affairs
Office of Resolution Management (08)
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ADVANCE
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